INDEX

Appellees' Objections 2

Brief Statement of the Case Sufficient for the Determination of Movant's Motion and Appellees' Objections 3

Documents Before the Court at This Point 4

Appellees' Objection 1. Movant Erroneously Seeks to Inject or Advance Here in This Court an Entirely New Constitutional Issue into This Case 5

Appellees' Objection 2. The United States Is Being Adequately Represented by Its Eminent Attorneys of Record 10

Appellees' Objection 3. Movant Has Not Shown an Interest in This Cause Sufficient to Justify Its Filing an Amicus Brief 11

Conclusion 11

TABLE OF CASES

Bush et al. v. *Orleans Parish School Board et al.*, 191 F. Supp. 871 (E.D. La. 1961), affd. *per curiam*, 367 U.S. 908 (1961), 6 L. Ed. 1249 (as *Denny et al.* v. *Bush et al.*, No. 868, Oct. 1960 Term) 7, 8, 9

Faubus et al. v. *United States et al.*, 254 F.2d 797 (8th Cir. 1958) 7, 8, 9

Hazel-Atlas Glass Co., Petitioner, v. *Hartford-Empire Co.*, 322 U.S. 238, 88 L. Ed. 1250, No. 393, Oct. Term, 1943 (1944) 8, 9

Knetsch v. *United States*, 364 U.S. 361, 370, 5 L. Ed. 2d 128, 134, No. 23, Oct. 1960 Term 6

Mapp v. *Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, No. 236, Oct. Term, 1960 (1961) 8, 9

Moffat Tunnel Improvement Dist. et al. v. *Denver & S. L. Ry. Co.*, 45 F.2d 715, 722 (10 Cir. 1930) 6

Sweatt, Petitioner, v. *Painter et al.*, 339 U.S. 629, 94 L. Ed. 1114, No. 44, Oct. Term, 1949 (1950) 8

United States v. *Barnett et al.*, 84 S. Ct. 984, 12 L. Ed. 2d 23, 57 (1964) 11

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

14th and 15th Amendments to the United States Constitution 3

Title 42, U.S.C., Sections 1971(a) and 1974 3

MISSISSIPPI CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 241 of the Mississippi Constitution of 1890 ..... 2, 4, 6

Section 241A of the Mississippi Constitution of 1890 3

Section 244 of the Mississippi Constitution of 1890 3

Mississippi Code of 1942 Recompiled, Section 3209.6, as amended, 1962 3

Chapters 570, 571 and 573, Mississippi Laws of 1962 3

MISCELLANEOUS

Supreme Court Rule 42(3) 3, 5, 6, 7, 10

72 Yale L.J. 694 (1963) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 73

UNITED STATES OF AMERICA,
Appellant,

vs.

THE STATE OF MISSISSIPPI; ROSS R. BARNETT, JOE T. PATTERSON, AND HEBER A. LADNER, as members of the Mississippi State Board of Election Commissioners; H. K. WHITTINGTON, Circuit Clerk and Registrar of Amite County; MRS. PAULINE EASLEY, Circuit Clerk and Registrar of Claiborne County; J. W. SMITH, Circuit Clerk and Registrar of Coahoma County; MRS. MARTHA TURNER LAMB, Circuit Clerk and Registrar of Leflore County; T. E. WIGGINS, Circuit Clerk and Registrar of Lowndes County; and WENDELL R. HOLMES, Circuit Clerk and Registrar of Pike County,
Appellees.

APPEAL BY UNITED STATES FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

OBJECTION OF ALL APPELLEES TO GRANTING LEAVE TO THE AMERICAN CIVIL LIBERTIES UNION TO FILE AMICUS CURIAE BRIEF

All Appellees, Defendants below, ten in number, hereby file their *objections* or *opposition* to the motion by the American Civil Liberties Union (Inc.) (hereinafter, whenever possible, referred to as *Movant*) for leave to file a brief *amicus curiae* in this cause in support of Appellant's contentions; but which motion shows, among other deficiencies, that Movant proposes to inject into this case or advance in this Court a new constitutional issue *not heretofore presented by Appellant, the United States,* in the Court below or in this Court. As to Appellees, Movant requested consent to such filing from only the State of Mississippi; it refused; all other Appellees would have refused. Appellees' objections (filed within the prescribed period permitted, on or before November 10, 1964) upon which they ask the Court to deny said motion and which will be amplified hereinafter, are

APPELLEES' OBJECTIONS

1. Movant *erroneously seeks* to introduce into this case at this point in this Court *a totally new constitutional issue* (Motion, p. 2, ¶3) which Movant's motion affirmatively shows was not and is not advanced or presented by Appellant United States to the Court below, or here. That new constitutional issue is Movant's attack upon the facial constitutionality of the Mississippi poll tax requirement to vote, in Section 241 of the Mississippi Constitution of 1890 —the Mississippi poll tax requirement applicable to State elections only. Said Section 241 *has no application of any kind to registration to vote.*

2. *The motion does not allege or show,* as required by Rule 42(3) of this Court, *that the 120 page brief,* including 22 pages of appendix, *prepared and filed herein on behalf of Appellant by the United States Solicitor General,* his Assistant, and *the staff* of the U. S. Attorney General *does not adequately present to this Court all aspects of this case or cause as made by Appellant,* Plaintiff below, in the U. S. District Court below as reflected by the record thereof filed in this Court.

3. Said motion *does not state or show that Movant,* as required by Rule 42(3) of this Court, *has an interest that would* be affected by the decision of this Court in this cause. Movant is not and cannot be or become registered to vote or vote in the District of Columbia or the States of New York, Illinois or Mississippi or in any other State in the Union.

BRIEF STATEMENT OF THE CASE SUFFICIENT FOR THE DETERMINATION OF MOVANT'S MOTION AND APPELLEES' OBJECTIONS

Appellant United States filed its complaint in the District Court below charging that the following sections of the Mississippi Constitution (1890) and statutes dealing with the qualifications to *register* to vote are unconstitutional on their face as violative of the 14th and 15th Amendments to the United States Constitution and Title 42, U.S.C., Sections 1971(a) and 1974, as they read on August 28, 1962, it sought an injunction to prevent their enforcement. Said Mississippi sections are: Sections 241A and 244 of said Constitution; Mississippi statutes, Mississippi Code 1942 Recompiled, Section 3209.6, as amended, 1962; and Chapters 570, 571, 572 and 573, Mississippi Laws of 1962; (said sections of the Constitution and statutes are copied in the

above order in the appendix to Appellant's brief on the merits at pages 106-115, inclusive, 99 and 105; thus we do not recopy them. That portion of Section 241 of said Constitution of Mississippi dealing with the said Mississippi poll tax requirement as to the act of voting was not and is not mentioned by Appellant—is not challenged and no issue is made thereon, at any point or place, in this cause as presented by the United States.

A 3-Judge Court was assembled. Appellees, Defendants below, filed, among other documents, their motion to dismiss for failure to state a claim upon which relief could be granted. The Court sustained that motion by its opinion printed in Appellant's jurisdictional statement, Appendix B, pages 28-179; and entered a judgment thereon as printed as Appendix C at page 180 thereof. Appellant appealed.

DOCUMENTS BEFORE THE COURT AT THIS POINT

We assume that only the documents filed herein will be considered by the Court in determining said motion, and which are: (1) Movant's motion; (2) these objections of all Appellees; *and the following documents* prepared and filed on behalf of the United States by its attorneys of record, *Solicitor General of the United States, his Assistant, Burke Marshall, Assistant Attorney General of the United States, and six other able members of the legal staff of the United States Department of Justice, and which documents are*: (a) jurisdictional statement *of twelve pages;* (b) *a 98 page brief on the merits of the case*, plus a 22 page appendix thereto; (c) the complaint of Appellant drawn and filed in the District Court by the United States Attorney General Robert F. Kennedy (R. 1-23 inclusive), together with two of his Assistants and

the local U. S. Attorney; (d) the remainder of the 1644 page record on appeal.

From the record before the Court it is clear that this Court *should not conclude* that eminent counsel of record for Appellant *have failed to adequately present to this Court the case of Appellant as shown by the appeal record from the District Court. Unless* the Court concludes that said attorneys of record *have failed to adequately present this case to this Court in all of its aspects, as made in the District Court,* then we submit *the motion should be denied* irrespective of all other considerations.

The rule of this Court applicable to this motion and these objections is Rule 42, Briefs of an Amicus Curiae, ¶3, which is quoted thus:

> "3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the Court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent."

APPELLEES' OBJECTION 1. MOVANT ERRONEOUSLY SEEKS TO INJECT OR ADVANCE HERE IN THIS COURT AN ENTIRELY NEW CONSTITUTIONAL ISSUE INTO THIS CASE

Movant erroneously seeks to inject or advance a totally new constitutional issue into this case in this Court at the appellate level—one not advanced by Appellant here or in the Court below—not presented to it, and not passed

upon by it. That new issue is Movant's attack upon the constitutionality of the Mississippi poll tax requirement to perform the act of voting, in Section 241 of the Mississippi Constitution—which is applicable only to State elections; and which *has nothing whatever to do with registration to vote.* An amicus, under said Rule 42(3), cannot inject such a new issue into a case in this Court. At page 2 of the motion, ¶3, Movant candidly admits and asserts that it is injecting such a new issue. This Court has recently *refused to "pass upon" a new issue* sought to be injected into a case *here even though the amicus brief was filed by consent of the parties.* The Court so held in the case of *Knetsch* v. *United States,* 364 U.S. 361, 370, 5 L. Ed. 2d 128, 134, No. 23, Oct. 1960 Term—there certiorari had been granted and all parties consented to the filing of amicus briefs; *when an amicus brief* sought *to raise a new point* which had *not been advanced by the petitioners for certiorari,* this Court, speaking through Justice Brennan, at page 370 of the U.S. Report, 134 L. Ed. Report, said:

> "Some point is made in an amicus curiae brief of the fact that Knetsch in entering into these annuity agreements relied on individual ruling letters issued by the Commissioner to other taxpayers. *This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it."* (Emphasis added) (In view of this statement we do not print said Section 241 of the Mississippi Constitution of 1890.)

To the same effect is the case of *Moffat Tunnel Improvement Dist. et al.* v. *Denver & S. L. Ry. Co.,* 45 F.2d 715, 722 (10 Cir. 1930), wherein the court says at page 722:

> "Briefs are received from amici curiae to aid the court in disposing of issues *before the court*; friends of the court cannot introduce new issues, nor can they sup-

plant the body to which the legislature has delegated the control of the affairs of the district." (Emphasis added)

The foregoing is sufficient basis for denying the said motion of the American Civil Liberties Union. *Movant* recognizes the above rule at page 2, ¶4 of its motion, but seeks to avoid it by reference to various authorities at page 3 thereof. None of the authorities mentioned by Movant support its position or assertions.

What the American Civil Liberties Union is seeking to do here is to analogize itself into the position of or assert the things and matters asserted by the *amicus in the cases cited by it at page 3 of the motion.* The authorities cited by Movant clearly show that Movant here cannot analogize itself, comparably in the case at bar, to the amicus in those cases. The language of the opinions themselves *and the files of this Court may be checked,* if desired, *to verify our statements hereinafter made upon said citations.* We will give the number and term of the cases in this Court which Movant cites so that examination of the files therein, if desired, will be facilitated. A general statement applicable to all of said authorities is put thus: The action by the *amicus* in *Faubus* and *Bush, infra,* was *requested and authorized* by order of the District Court in each case—certainly there is no similarity between Movant here and the Faubus and Bush amicus, the United States; in all other cases so cited by Movant the amicus brief was either filed by the United States as a matter of right, or the amicus brief was filed *pursuant to the consent of all parties to the cases.* Movant failed to point out the foregoing features in connection with the authorities cited by it. Here there was no consent from any Appellee; Movant is put to his motion under said rule of this Court 42(3).

For clarity of application, we will take up the foregoing cases *in a different sequence* than that in which they are cited at said page 3, including the footnote. The said cases cited by Movant, together with their number and term, are as follows: *Bush et al.* v. *Orleans Parish School Board et al.*, 191 F. Supp. 871 (E.D. La. 1961), affd. *per curiam*, 367 U.S. 908 (1961), 6 L. Ed. 1249 (as *Denny et al.* v. *Bush et al.*, No. 868, Oct. 1960 Term); *Faubus et al.* v. *United States et al.*, 254 F.2d 797 (8th Cir. 1958); *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, No. 236, Oct. Term, 1960 (1961); *Sweatt, Petitioner,* v. *Painter et al.*, 339 U.S. 629, 94 L. Ed. 1114, No. 44, Oct. Term, 1949 (1950); *Hazel-Atlas Glass Co., Petitioner,* v. *Hartford-Empire Co.*, 322 U.S. 238, 88 L. Ed. 1250, No. 393, Oct. Term, 1943 (1944).

In *Sweatt, supra, all amicus briefs were filed by consent of all parties.* Movant's comment in the footnote at page 3 of its motion and the language and action of the Court, apparently directed to "stronger mandate" and *its rejection* of suggested "broader issues" and the restriction of the opinion to the constitutional questions *only in the context of the particular case before the Court* demands the following citation from page 631 of the U.S. Report, p. 1118 of the Law Edition Report, thus:

> "Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the court. We have frequently reiterated that this court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. Rescue Army v. Municipal Court, 331 U.S. 549, 91 L. Ed. 1666, 67 S. Ct. 1409 (1947), and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition."

Faubus, supra (8th Cir. opinion): It cannot be used to analogize or transform Movant into and make it the equivalent of either the U. S. or the Attorney General thereof or any other official. There, by order of the District Judge (254 F.2d 802), the Court *"requested and authorized"* the U. S. Attorney General, and others named, to appear in the proceeding and they were *"directed"* to immediately file whatever was necessary within the terms of the order and proceed to stop "interferences" and "obstruction" to the order of the Court requiring integration of Central High School in Little Rock, Arkansas; upon such an order the United States, by its Attorney General and the U. S. Attorney entered the case as *amicus curiae* and proceeded to "(p. 805) *vindicate its honor*" (referring to the Court); "They were acting under the authority and direction of the Court to take such action as was necessary *to prevent its orders and judgments from being frustrated and to represent the public interest in the due administration of justice*" (p. 805).

Bush, supra, 191 F. Supp. 871, followed *Faubus, supra.* The *United States* by order of the District Court was *"requested* and *authorized* to appear in these proceedings as *amicus curiae"* and given the powers set out in the order at page 876 of the opinion—for the purpose of bringing the United States in was the same as in Faubus. The Court says, p. 876: *"It should also be stressed that the government appeared at the court's request."* Thus, under Bush the holdings therein *cannot be used* to transform *American Civil Liberties Union* into a *counterpart of the United States.*

In *Hazel-Atlas, supra,* the United States, through Solicitor General Faye, filed an *amicus brief* (p. 239)—as the United States had a right to do without a Court order. In *Mapp, supra,* all parties to the suit *consented* to the filing

of *amicus briefs*, including that of the American Civil Liberties Union—its counsel's argument time must have been subtracted from the time of the Defendant. *Krislov, The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694 (1963), cited by Movant at p. 3 of its motion *does not in any way assert anything contrary* to the contentions of Appellees in their objection to Movant's motion.

APPELLEES' OBJECTION 2. THE UNITED STATES IS BEING ADEQUATELY REPRESENTED BY ITS EMINENT ATTORNEYS OF RECORD

We submit that the case of the United States *as made in the District Court has been, and is being, adequately presented to this Court by its able attorneys of record.* A fair reading of Movant's motion, we believe, does not really charge to the contrary, but if it be asserted that it does, then we say that it is in error. Even a casual examination of the documents filed on behalf of the United States shows this. We cannot conceive how this Court could reasonably find that the efforts of Appellant's counsel do not constitute *adequate representation. In the absence of such a finding, Movant's motion should be denied.* Thus, Movant has not shown in its motion what said *Rule 42(3) requires* to justify *an amicus brief* by it.

Any additional matter, which is completely outside the issues raised by the parties hereto, is *only* a burden on this already overworked Court

APPELLEES' OBJECTION 3. MOVANT HAS NOT SHOWN AN INTEREST IN THIS CAUSE SUFFICIENT TO JUSTIFY ITS FILING AN AMICUS BRIEF

Clearly Movant has not shown an interest in this cause sufficient to justify granting leave to file an *amicus brief*. The language of Justice Goldberg in his dissent in the case of *United States* v. *Barnett et al.*, 84 S. Ct. 984, 12 L. Ed. 2d 23, 57 (1964), squarely supports our objections. At p. 1011 of the S. Ct. Report, p. 57 of the Law Edition Report, he said:

> "A traditional function of an amicus is to assert 'an interest of its own separate and distinct from that of the [parties],' whether that interest be private or public. It is 'customary for those whose rights depend * * * on the outcome of cases * * * to file briefs amicus curiae, in order to protect their own interests.' Weiner, Briefing and Arguing Federal Appeals (1961) 269."

It is clear from the foregoing and the documents now before the Court and the parties which have been filed in this cause that Movant does not have any right which depends on the outcome of this case.

This lack of right or interest on the part of Movant justified the denial of its motion for leave to file an amicus brief herein.

CONCLUSION

In view of the foregoing, Appellees respectfully request the Court to deny the motion of American Civil Liberties Union to file an *amicus curiae* brief in this case.

Respectfully submitted this the 6th day of November, 1964.

Respectfully submitted,

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